

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA FOR,
THE USE AND BENEFIT OF PETER A.
FULLER, individually and doing
business as PETER FULLER
CONSTRUCTION,

No. CIV.S-05-00325 DFL DAD

FINDINGS AND RECOMMENDATIONS

Plaintiff,

v.

JAMES E. ZOUCHA, an individual,
Defendant.

_____/

This matter is before the court on plaintiff's ex parte application for a prejudgment right to attach order, or in the alternative temporary protective order. This proceeding was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1). Having considered all written materials submitted in connection with plaintiff's application, the undersigned will recommend that the application for temporary protective order be granted.

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1 Plaintiff's application, memorandum of points and
2 authorities and declarations on file demonstrate that (a) the claim
3 upon which the application for attachment is based is one upon which
4 an attachment may be issued; (b) plaintiff has established the
5 probable validity of the claim; (c) the order is not sought for a
6 purpose other than the recovery upon the claim; and (d) the plaintiff
7 will suffer great or irreparable injury within the meaning of
8 California Code of Civil Procedure Section § 485.010 if the temporary
9 protective order is not issued. See Cal. Code Civ. Proc. § 486.020.¹
10 Further, in light of the ex parte nature of plaintiff's application,
11 and considering that one of the pieces of real property put at issue
12 by plaintiff's application appears to be defendant's residence, the
13 undersigned finds that the issuance of a temporary protective order
14 in lieu of a writ of attachment is appropriate at this time. See
15 Cal. Code. Civ. Proc. § 486.030 (allowing for temporary protective
16 order instead of writ of attachment where equity and justice under
17 the circumstances so dictate); In re Wind Power Systems, Inc., 841
18 F.2d 288, 291 (9th Cir. 1988) ("California law allows a creditor to
19 obtain a TPO against a debtor's property after it has shown in an ex-
20 parte proceeding the probable validity of its claim and the
21 probability of great harm if relief is not granted.").

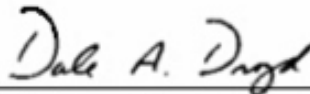
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24 ¹ Under Rule 64 of the Federal Rules of Civil Procedure, writs
25 of attachment "are available under the circumstances and in the
26 manner provided by the law of the state in which the district court
is held, existing at the time the remedy is sought[.]" Fed. R. Civ.
P. 64.

1 Accordingly, IT IS HEREBY RECOMMENDED that plaintiff be
2 directed to file the required undertaking² and that the district
3 judge assigned to this case sign the Temporary Protective Order filed
4 by plaintiff on April 8, 2005. In the event this recommendation is
5 adopted and plaintiff continues to seek a right to attach order and
6 writ of attachment, it is further recommended that plaintiff be
7 directed to follow the noticed hearing procedure to obtain that
8 relief. See Cal. Code Civ. Proc. § 486.030(b).

9 These findings and recommendations are submitted to the
10 United States District Judge assigned to the case pursuant to the
11 provisions of 28 U.S.C. § 636(b)(1). Within ten (10) days after
12 being served with these findings and recommendations, any party may
13 file written objections with the court and serve a copy on all
14 parties. Such a document should be captioned "Objections to Findings
15 and Recommendations." The parties are advised that failure to file
16 objections within the specified time may waive the right to appeal
17 the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th
18 Cir. 1991).

19 DATED: April 21, 2005.

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21 DALE A. DRCZD
22 UNITED STATES MAGISTRATE JUDGE

23 DAD:th
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24
25 ² See Cal. Code Civ. Proc. § 486.020 (requiring filing of
26 undertaking before temporary protective order is issued); Alan M.
Ahart, California Practice Guide: Enforcing Judgments and Debts, §
4:361 (2005) ("A TPO may not issue until an undertaking is filed").